

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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COREY BROWN,

Plaintiff/Counterdefendant-  
Appellant,

V

BELVEDERE CONSTRUCTION, INC.,

Defendant/Counterplaintiff-  
Appellee.

UNPUBLISHED

June 17, 2003

No. 238105

Wayne Circuit Court

LC No. 01-103306-CK

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Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for entry of a default judgment on defendant's counter-complaint and to dismiss plaintiff's complaint. We affirm.

I. Facts and Proceedings

On January 29, 2001, plaintiff, in propria persona, filed a complaint against defendant alleging breach of contract, violation of MCL 500.2006(1), and violation of MCL 445.901, et seq. (Michigan Consumer Protection Act) relative to a contract to repair his property at 19167 Irvington, Detroit, that had been damaged as a result of vandalism on October 24, 1997. Defendant filed an answer on March 12, 2001, denying plaintiff's allegations. Defendant also filed a counter-complaint on March 12, 2001, alleging breach of contract, fraudulent misrepresentation, and innocent misrepresentation. Defendant's counter-complaint requested judgment in excess of \$25,000.

On June 1, 2001, defendant filed its first motion for entry of default judgment. Defendant asserted that plaintiff had been served with the counter-complaint on March 7, 2001, but had failed to file a responsive pleading within the required time period. Defendant requested that the trial court enter default judgment on the counter-complaint in the amount of \$10,000, based on the affidavit of defendant's president, Peter Divito, that said that plaintiff owed defendant \$10,000.

The trial court heard defendant's motion for entry of default judgment on July 6, 2001. During the hearing, the trial court advised plaintiff, who at that point was still representing

himself, that he needed to answer the counter-complaint, and stated that it would give him seven days to do so. On that basis, the trial court denied defendant's motion. Defendant then asked the trial court for permission to include language in the order indicating that if plaintiff failed to respond to the counter-complaint within seven days, default judgment could be entered against him. Before answering, the trial court asked defendant if a default had already been entered, and defendant said yes.<sup>1</sup> Accordingly, the trial court stated that the default would have to be set aside before plaintiff could proceed, and advised him that the special allowances she had been making for him were going to end and that he should hire an attorney. Defendant also stated that there needed to be "some conclusion" to the case if plaintiff did not respond. The trial court instructed defendant to submit an order dismissing plaintiff's complaint without prejudice if plaintiff did not answer the counter-complaint in the time permitted, but declined to order that default judgment would enter on the counter-complaint if that contingency arose.

Defendant submitted an order to the court under the so-called "seven-day rule," MCR 2.602(B)(3), on July 11, 2001. Plaintiff apparently filed no objections to the order, and the order was signed on August 6, 2001. The order reflected the trial court's ruling that plaintiff was required to serve responsive pleadings by July 13, 2001,<sup>2</sup> and that if he failed to do so, his complaint would be dismissed.

On August 13, 2001, defendant filed a motion requesting entry of a default judgment and dismissal of plaintiff's complaint. Defendant claimed that plaintiff's complaint should be dismissed because he had still failed to answer the counter-complaint, in violation of the trial court's prior order. Defendant also requested entry of default judgment for this same failure.<sup>3</sup>

On September 17, 2001, prior to the hearing on this motion, plaintiff filed an answer to the counter-complaint, and counsel filed an appearance on his behalf. Defendant's motion was heard by the trial court on November 2, 2001. Plaintiff's counsel acknowledged that a proof of service for his answer to the counter-complaint had not yet been filed, and the court proceeded to question the parties concerning the merits of the lawsuit and the August 6, 2001 order. Defendant argued that plaintiff's claim was frivolous and that plaintiff did not timely file responsive pleadings. The court then asked when the complaint had been filed, and after plaintiff's counsel responded that he believed it had been filed in February, the court stated, "I'm going to grant the motion." The order entered that same day granted defendant a default judgment in the amount of \$10,000 and dismissed plaintiff's complaint without prejudice. This appeal followed.

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<sup>1</sup> The record in this case does not reflect that a default was ever entered against plaintiff for failure to answer the counter-complaint.

<sup>2</sup> The order erroneously stated that plaintiff was ordered to serve the responsive pleadings "upon [p]laintiff."

<sup>3</sup> Defendant's motion incorrectly stated that "Plaintiff seeks an entry of default judgment against Defendant . . . .," rather than the other way around.

## II. Standard of Review

The application and construction of court rules is an issue of law subject to de novo review. *Barclay v Crown Bldg & Development, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000). We review a trial court's decision to enter a default judgment for abuse of discretion. *Sturak v Ozomaro*, 238 Mich App 549, 569; 606 NW2d 411 (1999); *Barclay, supra* at 642. "An abuse of discretion involves far more than a difference in judicial opinion." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). A trial court abuses its discretion when "the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.'" *Id.*, quoting *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985). Where there has been a valid exercise of discretion, appellate review is sharply limited. *Id.*

## III. Analysis

On appeal, plaintiff contends that the trial court erred in granting summary disposition to defendant on its counter-complaint and that the trial court abused its discretion by dismissing the complaint for failure to respond to discovery. However, the trial court did not grant summary disposition, it entered a default judgment. Additionally, plaintiff's complaint was not dismissed as a discovery sanction but for violating the trial court's August 6, 2001 order. The confusion reflected in the manner in which plaintiff states his claims, however, reflects the confusing path of the trial court proceedings in this case.

We first address the trial court's entry of default judgment, and find no abuse of discretion by the trial court when it entered the default judgment in this case. The entry of default and default judgment is governed by MCR 2.603. MCR 2.603(B)(3) permits a party entitled to a judgment by default to apply to the court for the judgment. Pursuant to MRE 2.603(B)(3)(b), the trial court may conduct such hearings as are necessary prior to entry of a default judgment. Here, the trial court determined at a hearing that plaintiff had failed to comply with its order that the answer be filed on or by July 13, 2001, and determined that defendant was entitled to judgment by default because plaintiff failed to comply with the order. We find no abuse of discretion in the trial court's decision to enter a default judgment against plaintiff.

Plaintiff also argues that pursuant to MCR 2.603(B)(3)(b),<sup>4</sup> the trial court failed to properly determine the amount of damages plaintiff owes as a result of the default judgment. The court may conduct such hearings as it deems necessary and proper to determine the amount of damages. *Wood v Detroit Auto Inter-Insurance Exchange*, 413 Mich 573, 586; 321 NW2d 653 (1982). A hearing was not necessary because defendant attached an affidavit to its motion for entry of a default judgment, which stated \$10,000 was owed by plaintiff to defendant. Therefore, we find the trial court did not abuse its discretion in entering a default judgment without conducting a hearing on damages.

<sup>4</sup> MCR 2.603(B)(3)(b)(ii) provides: "if , in order for the court to enter judgment or to carry it into effect, it is necessary to determine the amount of damages, the court may conduct hearings or order references it deems necessary and proper, and shall accord a right or trial by jury to the parties to the extent required by the constitution."

Plaintiff next argues that the trial court abused its discretion in dismissing his complaint for failure to respond to discovery. We disagree. We review an appeal from a trial court's order of dismissal for an abuse of discretion. *Thorne v Carter*, 149 Mich App 90, 93; 385 NW2d 738 (1986). In order for an exercise of judicial discretion to rise to the level of an abuse of that power, the result must be "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Edge v Ramos*, 160 Mich App 231, 234; 407 NW2d 625 (1987).

In his brief on appeal, plaintiff argues the trial court dismissed his complaint for plaintiff's failure to answer interrogatories. However, plaintiff's complaint was dismissed because he failed to comply with the trial court's July 6, 2001, order to file an answer or responsive pleading to defendant's counter-complaint within seven days. A defendant may move for dismissal of an action or any claim brought against the defendant where the plaintiff fails to comply with the court rules or any order of the court. *Thorne, supra*, 149 Mich App 93; MCR 2.504(B)(1). Plaintiff was notified that his complaint would be dismissed if he did not file an answer by July 13, 2001, and he failed to do so. We conclude that the trial court did not abuse its discretion in dismissing plaintiff's complaint.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder

/s/ Jessica R. Cooper